No. 3887.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

R. C. Klepper, doing business under the fictitious name of Bethlehem Motor Company,
Plaintiff in Error,

vs.

John P. Carter, Collector of Internal Revenue, Southern District of California,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

By Act of Congress, approved February 24th, 1919, chapter 18, section 900, it is enacted:

> "There shall be levied, collected and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> "(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts and accessories

therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

* * * * * * * *

"(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;"

(The foregoing was an amendment to Act of Congress, approved October 3rd, 1917, 40 Statutes at Large, 316, Sec. 600.)

(This Act of Congress was further amended by Act of November 23rd, 1921, chapter 136, Sec. 900, 42 Statutes at Large, but such amendment nor the regulations promulgated thereunder, in no manner affects the case at bar.)

The plaintiff in error, was a dealer in automobile trucks, during the year 1919 (commencing business July 1st, 1919) at Eighteenth and Main streets, city of Los Angeles, California, and maintained a sales room and office at said place, but did not own, operate or maintain nor was interested in either an assembling plant or place for the repair of automobile trucks; being engaged solely in the business of buying and selling automobile trucks.

The Bethlehem Motors Corporation, a corporation of Allentown in the state of Pennsylvania, was a manufacturer of automobile trucks, bodies and accessories thereto, selling automobile trucks both, with and without bodies, and issued printed, illustrated cata-

logues and price lists of bodies, separate from their catalogue of automobile trucks.

The Weber Auto Body and Trailer Works, located at 688 North Spring street, in the city of Los Angeles, was engaged in the manufacture of automobile and automobile truck bodies, and issued an illustrated catalogue and price list of many designs of bodies, therefor, but was not engaged in the manufacture of automobile trucks or chassis.

That said Bethlehem Motor Corporation, as well as many such companies manufacture and sell automobile truck chassis, separate from the body, and sell the body separate from the chassis, as well as assembled.

That during the vear 1919, plaintiff in error, purchased thirteen automobile trucks from said Bethlehem Corporation, equipped with cabs, and complete and ready for the road, but did not purchase bodies for said automobile trucks, from said Bethelehem Motors Corporation, but did purchase bodies for said automobile trucks, from said Weber Auto Body and Trailer Works, as needed; the user, selecting the design thereof from the said illustrated catalogue and price list of said Weber Company, and said Weber Company fitted said bodies to said chassis, at the plant of said Weber Company, in the due course of business of said Weber Company.

The truck with the body, then being delivered to the user and not returned to the salesroom or warehouse of plaintiff in error.

The Bethlehem Corporation, paid the war tax, on the 13 automobile trucks, at three per centum on the price for which the same were sold to plaintiff in error, and added the amount of the tax, by separate item in the invoice, to the invoice price and plaintiff in error paid to said Bethlehem Corporation, the amount of such tax.

The Weber Company paid the war tax on the thirteen bodies, at five per centum of the price for which the bodies were sold to plaintiff in error, and added the amount of the tax, by separate item in the invoice to the invoice price and plaintiff in error paid to said Weber Company, the amount of such tax.

The defendant in error is the Internal Revenue Collector, and as such demanded of and compelled plaintiff in error, to report and pay additional war tax of three per centum, as a manufacturer, on the gross sales price, for which plaintiff in error sold the automobile trucks to his customer, adding penalties for failure of plaintiff in error to report such tax, as a manufacturer but, deducting the amount of tax so paid by plaintiff in error, to the manufacturers, the Bethlehem Corporation and the Weber Company.

Such payment was fixed by the defendant in error, as three distinct items, the first: On seven trucks amounting to $297.19, and second: On four trucks amounting to $108.21 and the third: On two trucks, amounting to $58.77.

Plaintiff in error filed applications for abatement of the tax, and then, after payment, filed claim for re-

fund, and in manner and form according to the provisions of law and the regulations promulgated by the secretary of the treasury, in that regard, duly appealed to the Commissioner of Internal Revenue, and relief being denied upon such appeal, filed this suit to recover the moneys so wrongfully exacted and paid.

For the purposes of trial, the attorneys for plaintiff in error and for the defendant in error, made an agreed statement of facts and, upon stipulation, the cause was tried to the court upon such stipulated facts.

Judgment was rendered against plaintiff in error, and plaintiff in error brings the case to this Honorable Court by writ of error.

The agreed statement of facts is brought properly into the record by bill of exceptions settled, allowed and filed in the cause, and this statement of the case conforms to said agreed statement of facts appearing in the printed transcript in this cause, at pages 28 *et seq.* and also incorporated in the bill of exceptions appearing at pages 17 *et seq.* of the transcript.

Specifications of Error.

I.

The decision of the court is not sustained by sufficient evidence.

II.

The decision of the court is contrary to the evidence.

III.

The decision of the court is contrary to law.

ARGUMENT.

The complaint is in three counts, inasmuch as the Collector of Internal Revenue, arbitrarily divided his demands for taxes into three several demands for payment, as shown by the complaint.

The first for the balance of $108.21. [Vide p. 6, Tr.]

The second for the balance of $297.19. [Vide p. 8, Tr.]

The third for the balance of $58.77. [Vide p. 9, Tr.]

The sole question is as to whether or not plaintiff in error was a MANUFACTURER, for the statute only includes manufacturer, producer and importer.

The terms, manufacturer and producer, in the sense used are synonymous.

The lexicographer gives us the following:

> "PRODUCER—
>
> "(1) One who produces, brings forth or generates.
>
> "(2) One who grows agricultural products or manufactures crude materials into articles of use."

The word MANUFACTURER is defined thus:

> "(1) To make (wares or other products) by hand, by machinery or by other agency; as to manufacture cloth, nails, glass, etc.
>
> "(2) To work, as raw or partly wrought materials into suitable forms for use; as, to manufacture wool, cotton, silk or iron."

In Lake v. Guillott, 19 Southern Reporter, the Louisiana court held that to assemble imports, *i. e.*, the handle, the frame and the cover of umbrellas and parasols, all manufactured abroad, did not constitute a manufacturer, notwithstanding such importer placed thereon ferrules and the snaps necessary to hold the umbrella extended."

> "MANUFACTURE is distinguishable from MECHANIC OR TRADESMAN, and has been held, under statute, to be identical with PRODUCER."
> 26 Cyc. p. 527.

Plaintiff in error is a TRADER, under the definition as set forth *In re* Kingston Realty Company, 160 Fed. Rep. 445-447.

In the case of Tidewater Oil Company v. United States, 171 U. S. 210, we find the definition of the word *"manufacturer."* In that case the Tidewater Oil Company, purchased (in Canada), shaped shooks, from which to make the sides, ends, tops and bottoms of certain boxes or packing cases; these shaped shooks were bundled and shipped to New Jersey and there, with nails manufactured in the United States, from rods imported from England, formed into boxes or packing cases.

The Supreme Court held that such boxes were NOT manufactured in the United States.

In Tidewater Oil Company case, the mere assembling did not constitute a manufacture.

To the same effect:

Cate v. Connell, 173 Fed. 445-447;
Hall & Kaul v. Friday, 158 Fed. 593;
Re T. E. Hill Co., 148 Fed. 832;
Re First Bank of Bell Fourche, 152 Fed. 64.

The foregoing cases accept the definition of the lexicographer, and we submit that Congress used the terms in the sense of their common acceptation.

In the case at bar it is stipulated that the *'chassis'* is the automobile truck, complete, ready for the road. [Vide Tr. p. 18.]

That plaintiff in error bought from the Bethlehem Motors Corporation said chassis complete. [Vide Tr. p. 19.]

That the Weber Company manufactured and produced the automobile truck bodies and placed them on the chassis. [Vide Tr. p. 19.]

Counsel for defendant in error, in the argument in the District Court cited the construction of the Munitions Tax Act, and section 301 thereof by the United States Supreme Court, in the case of

Carbon Steel Company v. Lewellyn, 251 U. S. 501.

We will quote the statute, as quoted by the Supreme Court at pages 503-504:

"Sec. 301 (1) That every person manufacturing * * * (c) projectiles, shells, or torpedoes of any kind * * * or (f) any part of any of the articles mentioned * * * (c) * * *

shall pay for each taxable year, in addition to the income tax imposed by this Title I an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured in the United States."

In that case there is a wide distinction in the facts as well as the kind of tax imposed, from the facts of the case at bar.

The court say:

"It (the petitioner) was the contractor for the delivery of the shells, made the profits on them, and the profits necessarily reimbursed all expenditures on account of the shells. It was such profits that the act was intended to reach—profits made out of the war and taxed to defray the expense of the war. Or, as expressed by the Court of Appeals, Congress 'felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation.' Petitioner, it is true, used the services of others but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge. And petitioner kept control throughout—never took its hands off, was at pains to express the fact, and retained its ownership of all of the materials furnished by it, and the completed shell belonged to it, until delivered to the Britsh Government. And further, the steel furnished by it was advanced above a crude state—advanced to slugs. The nicking of it by an outside company we consider of no consequence, for

after nicking they were redelivered to petitioner and by it 'broken or separated' into slugs."

The statute is explained in the case as follows:

"The tax was on profits and measured by them * * * the tax here in issue is the tax on the profits of the petitioner, not on the profits of the subcontractors." (Page 506.)

At the argument in the District Court, counsel for defendant in error referred to a construction of the Act of Congress, approved October 3rd, 1917 (40 Stat. at Large 316, section 600) the present act being an amendment thereof.

Rech-Marbaker v. Lederer, Collector, 263 Fed. 593.

Later, Judge Dickinson, in the case of Foss-Hughes Co. v. Lederer says: "Congress, in a subsequent act, corrected this oversight."

The construction, as made in the case at bar, following the referred to construction of the older statute, in effect, would nullify the present statute, and evade the tax.

It is common knowledge that the manufacturer sent his manufactured chassis to market on its own wheels and power—during and since the war. A user buys one of these chassis, and builds a platform on the frame and, there being no *"sale"* of the completed automobile truck, there is no tax (?). Again: The user buys a chassis, and from another buys a body, and assembled,

it becomes a completed automobile truck. But, there being no sale as a completed truck, there is no tax (?).

Just a step further: The Bethlehem Company being manufacturers of both chassis and bodies, sells a chassis, to the user today and tomorrow sells the body to the user's hired hand, in good faith, and without knowledge that the body is to be used on the chassis so sold. The Department insists that, there being no completed automobile truck *"sold,"* there is no tax (?).

The theory of the statute was that the *"manufacturer"* should pay the tax and, while in practice the user actually pays, this does not change the *"intent"* of the law-maker.

Plaintiff in error was not a manufacturer.

Respectfully submitted,

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Robert E. Austin,

Attorneys for Plaintiff in Error.